

MOTION FILED  
APR 10 1978

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In the  
Supreme Court of the United States

October Term, 1977

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No. 8, Original

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STATE OF ARIZONA,

*Complainant,*

*vs.*

STATE OF CALIFORNIA, PALO VERDE  
IRRIGATION DISTRICT, IMPERIAL  
IRRIGATION DISTRICT, COACHELLA  
VALLEY COUNTY WATER DISTRICT,  
THE METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA, CITY OF  
LOS ANGELES, CITY OF SAN DIEGO, and  
COUNTY OF SAN DIEGO,

*Defendants,*

UNITED STATES OF AMERICA and  
STATE OF NEVADA,

*Intervenors,*

STATE OF NEW MEXICO and STATE OF UTAH,

*Impleaded Defendants.*

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**Motion of the Colorado River Indian Tribes and the  
Cocopah Indian Tribe for Leave to Intervene and  
Petition of Intervention.**

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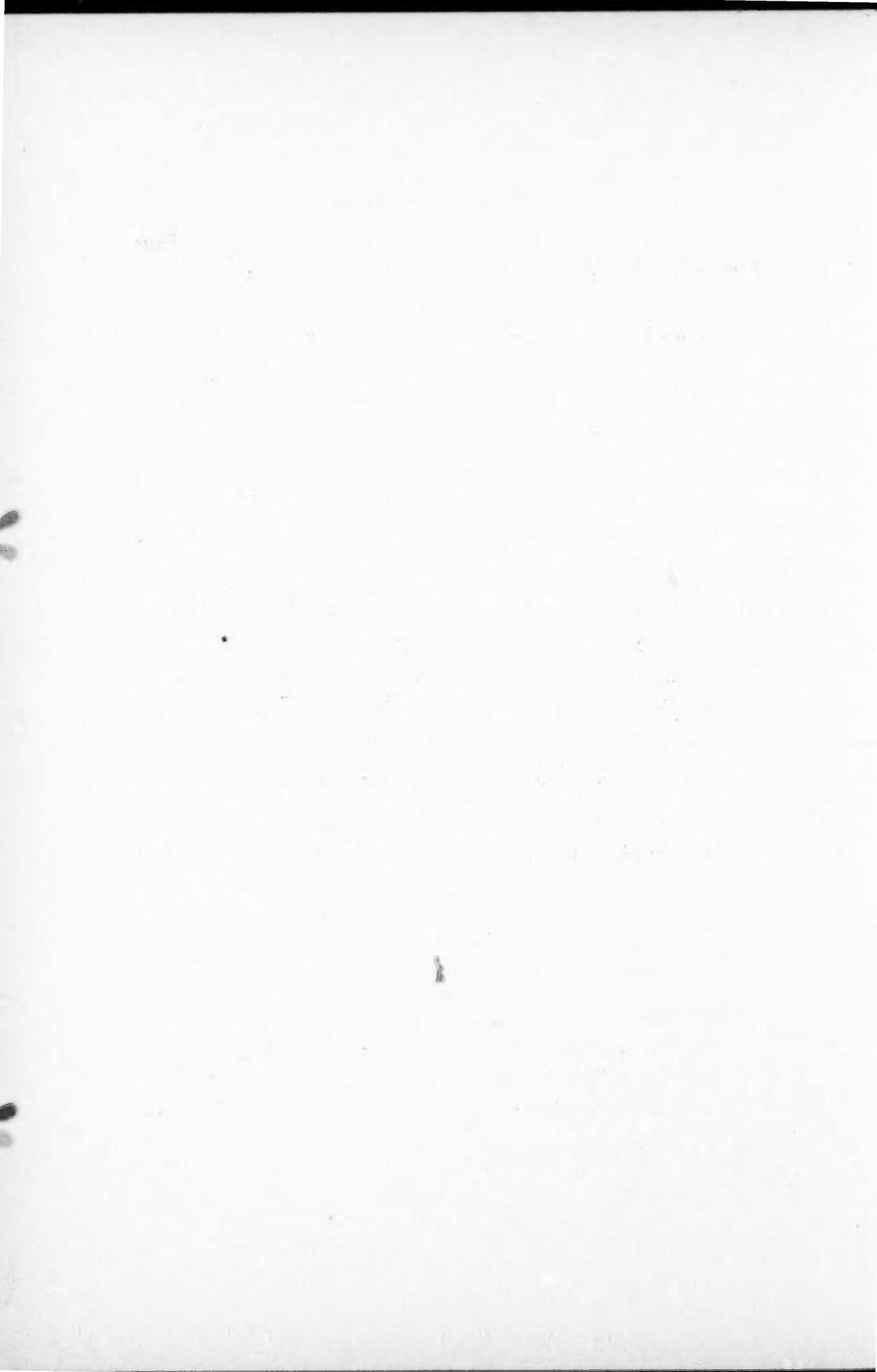
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**Motion of the Colorado River Indian Tribes and the  
Cocopah Indian Tribe for Leave to Intervene**

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April 10, 1978

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The Colorado River Indian Tribes and the Cocopah Indian Tribe (hereinafter sometimes referred to as the "two Tribes") are tribes duly organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S. Code § 461 et. seq., and recognized as such by the United States. Individually and collectively, they move this Court for leave to file a Petition of Intervention, and in support thereof state as follows:

## I

### INTRODUCTION

In 1952 this Court exercised the original jurisdiction vested in it under Article III, Section 2 of the United States Constitution to entertain this suit. After preliminary pleadings were filed, the Court referred this case to a Special Master, who filed his report with the Court on January 16, 1961, at 364 U.S. 940 (1961). On June 3, 1963, the Court rendered its opinion in this case, 373 U.S. 546 (1963), and on March 9, 1964, the Court entered a corresponding Decree (hereinafter referred to as the "Decree"), 376 U.S. 340 (1964), which was amended on February 28, 1966, 383 U.S. 268 (1966).

Although the Court then determined the principal issues involved in the suit, it reserved ruling upon several related questions. The Court consequently provided procedures for future determination of those unresolved issues in Article II(D)(5), Article VI and Article IX of the Decree.

Invoking Article VI of the Decree, on May 3, 1977, the State of Arizona, Complainant, the California Defendants and the State of Nevada, Intervenor, (hereinafter referred to as the "States") filed a Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree; Proposed Supplemental Decree; and Memorandum in Support of Proposed Supplemental

Decree (hereinafter collectively referred to as the "Joint Motion"). On November 10, 1977, the United States filed its Response to the Joint Motion.

Subsequently, the States filed their Reply (dated February 27, 1978) to the Response of the United States, in which it is asserted that the States and the United States have reached agreement upon the language of the proposed Supplemental Decree.

The two Tribes approve and request the entry of a Supplemental Decree in accordance with the Joint Motion, but in the modified form presented in the Reply of the States dated February 27, 1978.

In January of 1978, the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe and the Quechan Tribe of the Fort Yuma Indian Reservation filed a Motion for Leave to Intervene as Indispensible Parties joined in by the National Congress of American Indians as *amicus curiae*. The two Tribes (Colorado River Indian Tribes and the Cocopah Indian Tribe) now also seek this Court's permission to intervene in this action.

It is appropriate and in the interests of justice to present for contemporary consideration by this Court all matters and issues raised by all interested parties which are now ripe for adjudication.

## II

### THE TWO TRIBES' INTERVENTION IS JUSTIFIED TO PREVENT FURTHER IRREPARABLE HARM

In 1953 the Court allowed the United States to intervene for itself and on behalf of certain Indian tribes, including the two Tribes, who were and remain beneficial owners of water rights in the Colorado River which are the subject of this action. The United States has been

charged with the fiduciary duty of representing the two Tribes and their interests herein. However, the government has not adequately discharged its duty, causing an agonizing and unreasonable delay in the final perfection of some of the rights of the two Tribes to water in the Colorado River. Until all of such rights are finally perfected, the two Tribes will continue to suffer irreparable harm in that they are unable, through no fault of their own, to fully establish, develop and derive benefit from their water rights. Furthermore, the two Tribes' losses inure annually to the benefit of others whose interests are subordinate, but who utilize water to which the two Tribes would be entitled if their rights were perfected. Such use of that water by those whose claims are inferior will inevitably create a dependency which will influence and inflame opposition to the two Tribes' subsequent efforts to perfect and utilize their rights. Hence, it is submitted that there is urgency and necessity for the two Tribes to intervene in this matter to prevent further irreparable harm.

### III

#### **THE GOVERNMENT'S CONFLICTS OF INTEREST JUSTIFY INDEPENDENT PARTICIPATION BY THE TWO TRIBES**

Throughout the course of this action the representatives of the government have had the awkward and perhaps impossible task of fully representing the United States and its agencies while simultaneously representing the two Tribes and other Indian tribes, whose interests in certain respects appear to be adverse to those of the United States and its agencies. Furthermore, the dual representation which creates the conflict does not arise solely within this action. Perhaps the most significant illustration of that point is the concurrent representation of affected Indian tribes and the Interior Department's Bureau of Reclamation, which has extensive agreements with several states to

construct and operate large federal reclamation and irrigation projects utilizing great quantities of Colorado River water.

The United States has a dominant role in the control and allocation of water and the management of the entire multi-state basin of the Colorado River, as demonstrated by the definitions and provisions of the Decree. It administers such comprehensive programs as those established by the Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S. Code §§617-617t, and the Colorado River Basin Project Act (Central Arizona Project), P.L. 90-537 (1968), 82 Stat. 885, 43 U.S. Code §§1501-1556. Its functions inevitably cause conflicting demands upon the United States, including those made by Indian tribes and federal and state entities. Furthermore, direct and indirect interests of various Indian tribes in the water of the Colorado River differ in scope and extent, and in some circumstances may even be in conflict with each other. Consequently, it is asserted that the responsible legal representatives of the United States are placed in an untenable position in attempting to adequately protect all of the differing interests. This is so despite their sincere effort to take a position not in active opposition to the interests of the Indian tribes. The two Tribes therefore should have the opportunity for independent participation in the adjudication of their water rights in this action.

The effect of representing multiple parties having differing interests, whether or not they are all involved in a single legal proceeding, and whether their interests are direct or indirect, may be a compromise of one party's interest in favor of another's, even if done in good faith. An inability to fairly dispose of a conflict of interest also may result in excessive delay in resolving the entire subject matter, which may have occurred in this case.

Congress has recently recognized these very problems

and has responded by enacting legislation authorizing independent representation of Indians in conflict situations. Act of January 4, 1975, P.L. 93-638, 88 Stat. 2203, 25 U.S. Code §450f; See *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir., 1976), *cert. den.* 429 U.S. 112. In this instance the United States has several apparent or potential conflict situations, and as authorized by Congress, the two Tribes therefore should be allowed independent representation to prevent further irreparable harm.

#### IV

### **THE GOVERNMENT'S FAILURE TO TIMELY ASSERT CLAIMS OF THE TWO TRIBES TO ADDITIONAL PRESENT PERFECTED RIGHTS RESULTING FROM RESOLUTION OF BOUNDARY DISPUTES JUSTIFIES INTERVENTION BY THE TWO TRIBES**

At the time that the Court entered the Decree, there were known boundary disputes involving the Colorado River Indian Reservation (the reservation of one of the two Tribes), and one other reservation. Recognizing that the tribes residing there would be entitled to additional diversions from the Colorado River upon favorable final determinations of those disputes, the Court expressly provided in Article II(D)(5) of the Decree that the quantities of adjudicated water to which each of those tribes is entitled thereunder "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that boundaries of the respective reservations are finally determined." Neither the Court, the parties to this action, nor the Cocopah Indian Tribe were then aware of a boundary dispute involving the Cocopah Indian Reservation, and therefore the Court did not expressly provide in the Decree for such adjustment to be applicable to any boundary dispute involving Cocopah lands. However, the Court did provide a



means of redress for the benefit of any of the affected Indian tribes by providing in Article IX of the Decree as follows:

Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

The two Tribes are currently entitled to have decreed to each of them additional present perfected rights in the waters of the Colorado River because of favorable determinations of disputes over the boundaries of their respective reservations. However, the government has failed to seek adjudication of such additional present perfected rights.

The two Tribes recognize that adjudication of such additional present perfected rights upon the resolution of boundary disputes does not fall within the scope of the procedure set forth in Article VI of the Decree and disposition of the pending Joint Motion. However, they submit that the determinations of priority to be made under Article VI of the Decree, and the implementation of those rights of others, will have direct legal and practical effects upon their water rights, so that all should be considered concurrently. Fair and orderly adjudication can be achieved only if the Court has before it all present, mature, pending claims. The two Tribes, if allowed by the Court to intervene, will move the Court to enter a Supplemental Decree or amend the original Decree adjudicating additional present perfected rights in the Colorado River to the two Tribes as set forth below. The two Tribes will make such motions pursuant to Articles II(D)(5) and IX of the Decree for the Court's concurrent consideration with the Joint Motion presently before the Court.

## **COCOPAH INDIAN RESERVATION**

Subsequent to the entry of the Decree there was disclosed a boundary dispute which became the subject of *Cocopah Indian Tribe v. Morton*, CU-70-573-PHX-WEC, (D.Ariz.). On May 12, 1975, that dispute was finally resolved by the entry of a judgment, from which no appeal was sought. That judgment confirmed that an additional 883.53 acres of land, which were not determined at the time of the Decree to be part of the Cocopah Indian Reservation, are and have always been within that reservation. Of those additional acres, approximately 780 are practicably irrigable and have an annual diversion duty of 6.37 acre-feet for each such acre.

Nearly three years after the entry of that judgment, the government yet has not requested this Court to adjudicate for the Cocopah Indian Tribe the additional present perfected rights to which that tribe is entitled as a result of the favorably resolved boundary dispute. If, however, the Cocopah Indian Tribe is allowed to intervene by the Court, it will move pursuant to Article IX of the Decree for the entry of a Supplemental Decree or amendment of the original Decree adjudicating additional present perfected rights to the Cocopah Indian Tribe in the waters of the Colorado River in annual quantities not to exceed (i) 4,969 acre-feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 780 acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.

## **COLORADO RIVER INDIAN RESERVATION**

By Order of the Secretary of the Interior dated January 17, 1969, approved by two successive Secretaries of the Interior by their decisions of June 2, 1970 and March 8, 1972, a major part of the western boundary of the Colorado River Indian Reservation was confirmed. It constituted resolution of some of the boundary disputes which were the

express subject of Article II(D)(5) of the Decree. The Secretarial Order was a determination that approximately 4,439 additional acres of land, which were not determined at the time of the Decree to be within the Colorado River Indian Reservation, are and always have been within that reservation. Of these additional acres approximately 2,710 net acres are practicably irrigable and have an annual diversion duty of 6.67 acre-feet for each such acre.

Three disputes involving lands within that western boundary portion of the reservation, in which additional legal and factual questions were in issue, also have been finally resolved. *United States v. Robert H. Clark, et al.*, 72-1625-RJK; *United States v. Samuel F. Curtis, et al.*, 72-1624-DWW; and *United States v. Brigham Young University, et al.*, 72-3058-DWW, each in the U.S. District Court for the Central District of California. They further confirmed the inclusion of lands within the Colorado River Indian Reservation for which water rights were not adjudicated by the Decree because of the pendency of such disputes.

More than nine years after entry of that Order the government yet has not requested this Court to adjudicate for the Colorado River Indian Tribes any additional present perfected rights to which they are entitled as a result of the resolved boundary disputes. Continued delay in perfecting the additional water rights attributable to the lands involved in resolved boundary disputes will cause further irreparable damage to the Indians.

Therefore, if this Motion to Intervene is granted by the Court, the Colorado River Indian Tribes will move pursuant to Article II(D)(5) of the Decree for the entry of a Supplemental Decree or amendment to the original Decree adjudicating additional present perfected rights to the Colorado River Indian Tribes in the waters of the Colorado River in annual quantities of (i) an estimated



18,076 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of an estimated 2,710 net acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.

V

**INTERVENTION BY THE TWO TRIBES IS  
JUSTIFIED BY THE GOVERNMENT'S FAILURE  
TO TIMELY ASSERT THEIR CLAIMS FOR  
OTHER ADDITIONAL PRESENT PERFECTED  
RIGHTS WHICH HAVE NOT BEEN  
PREVIOUSLY ASSERTED ON THEIR BEHALF**

Prior to the entry of the Decree, for reasons unknown by the two Tribes, the United States failed or declined to present to the Special Master or to the Court claims for and evidence of all the practicably irrigable acreage within the then undisputed boundaries of the two Tribes' reservations, for which water rights then should have been decreed to them. That land may total approximately 37,449 practicably irrigable acres within the Colorado River Indian Reservation and a number of practicably irrigable acres within the Cocopah Indian Reservation which is presently being computed and soon shall be available for consideration.

The government's failure to assert such claims is a breach of fiduciary duty, which may have been due to conflicts of interest. It has failed on behalf of the two Tribes to seek any relief for such neglect, oversight or failure, under the authority of Article IX of the Decree or otherwise.

The 1964 Decree does not bar relief by *res judicata* with respect to such omitted practicably irrigable lands. If the government's representation involved a conflict of interest, the Indians are not now bound by the resulting Decree. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane*

*v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977); *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1106-1107 (10th Cir. 1976), *cert. den.*, 429 U.S. 112; *United States v. South Pacific Transportation Corp.*, 543 F.2d 676, 680 (9th Cir., 1976), and that question can be resolved only upon consideration of evidence at a hearing.

Notwithstanding urging by the two Tribes that the government seek adjudication pursuant to Article IX of the Decree of additional present perfected rights for the omitted practicably irrigable acreage, the government has failed to do so. Therefore they submit this Motion to Intervene to allow them to assert those claims themselves.

## VI

### **INTERVENTION IS INDEPENDENT OF CURRENT PROCEEDINGS PURSUANT TO ARTICLE VI OF THE DECREE OF MARCH 9, 1964, AND IT IS NOT UNTIMELY**

The Motion to Intervene of the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe and the Quechan Indian Tribe, and the Responses thereto of the States and the United States, all involve the question of whether or not intervention and the raising by the Indians of additional claims to water rights should be included within the proceedings to determine the Joint Motion made pursuant to Article VI of the 1964 Decree.

The two Tribes on the other hand take the position that although the subjects of their Motion for Intervention may not be encompassed in the Article VI proceedings as such, they should be contemporaneously entertained by the Court. While it may be true that they are not procedurally included within consideration of the Joint Motion, it is equally true that the pendency of the Joint Motion does not preclude the submission to and considera-

tion by the Court of other motions and requests. This Motion to Intervene by the two Tribes may stand on its own merits, regardless of the pendency of the Joint Motion. It is, however, logical that they be considered as companion matters. It would be a disservice to the Court and to all affected parties and interests to proceed piecemeal in presenting for adjudication the respective claims of the parties. Additionally, the Court would be better able to determine the rights of all affected parties if it is made aware of all existing and pending claims. The Indians might even be fairly criticized if they failed now to present their claims to the Court and deliberately waited to do so until after consideration of the Joint Motion. Orderly adjudication demands that all such claims be presented to the Court at once.\*

It is incongruous for the States to maintain that present Indian efforts to intervene and to present issues under Articles II and IX of the Decree should be delayed and postponed until after the Article VI proceeding is concluded, while also maintaining that such Indian efforts are untimely because they were not undertaken earlier. It is also unjust for the States to seek to bar the assertion in this action by the Indians of their unperfected water rights, while the States, and the entities they represent, continue to utilize water to which the Indians should be entitled.

Lastly, it is true that some of the claims now sought by the two Tribes to be adjudicated could have been asserted earlier. But the reason for the tardiness has been the failure of their trustee, the United States, to seek their adjudication. That is precisely the reason for their Motion to Intervene. The two Tribes should not be penalized for

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\*There remain two boundary disputes in the Colorado River Indian Reservation outside the area involved in the Order of the Secretary of the Interior of January 17, 1969. But because they have not yet been finally resolved, they cannot be presented to the Court at this time.

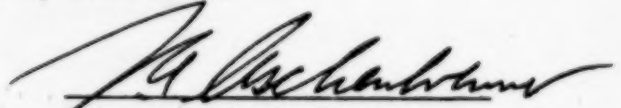
such inaction, since they have not had the opportunity to proceed in their own name and right.

Other additional claims asserted by the two Tribes are based upon quite recent resolutions of disputed boundaries. Action upon those claims must be initiated now before they too become subject to the charge that their assertion has been too long delayed and is no longer timely.

The two Tribes are experiencing the misfortune, from entry of the Decree and continuing to date, of being unable to have their claims presented to the Court as they accrue and then being told that they waited too long to present them. As each year passes, their frustration and detriment continues to build. It is therefore necessary for the two Tribes to intervene and seek relief from the Court.

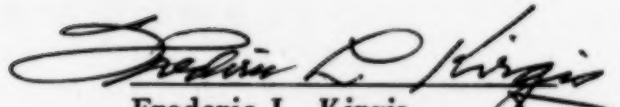
WHEREFORE, individually and collectively, the Colorado River Indian Tribes and the Cocopah Indian Tribe pray that this Court grant their Motion for Leave to Intervene and allow them to file the Petition of Intervention annexed to this Motion.

Respectfully submitted,



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STATE OF NEW MEXICO and STATE OF UTAH,

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**Petition of Intervention  
of  
Colorado River Indian Tribes  
and Cocopah Indian Tribe**

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April 10, 1978

The Colorado River Indian Tribes and the Cocopah Indian Tribe (hereinafter sometimes referred to as the "two Tribes") are tribes duly organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S. Code §461 et seq., and recognized as such by the United States. Individually and collectively, they submit this Petition of Intervention.

## I

The Colorado River Indian Tribes and the Cocopah Indian Tribe are each currently entitled to have decreed to them additional present perfected rights in the waters of the Colorado River upon and because of favorable determinations of disputes over the boundaries of their respective reservations, pursuant to Article II (D)(5) and Article IX of the Decree herein of March 9, 1964.

The Cocopah Indian Tribe moves for the entry of a Supplemental Decree or amendment of the original Decree adjudicating additional present perfected rights to the Cocopah Indian Tribe in the waters of the Colorado River in annual quantities not to exceed (i) 4,969 acre-feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 780 acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.

The Colorado River Indian Tribes move for the entry of a Supplemental Decree or amendment of the original Decree adjudicating additional present perfected rights to the Colorado River Indian Tribes in the waters of the Colorado River in annual quantities of (i) an estimated 18,076 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of an estimated 2,710 net acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.



## II

There was a failure to present to the Special Master or to the Court claims for and evidence of all the practicably irrigable acreage within the undisputed boundaries of the two Tribes' reservations, for which water rights then should have been allocated to them by the Decree herein of March 9, 1964. That land totals approximately 37,449 practicably irrigable acres within the Colorado River Indian Reservation and a number of practicably irrigable acres within the Cocopah Indian Reservation which is currently being computed and soon will be available for consideration.

The Cocopah Indian Tribe moves pursuant to Article IX of that Decree for entry of a Supplemental Decree or amendment of the original Decree adjudicating additional present perfected rights to the Cocopah Indian Tribe for such additional practicably irrigable acreage within its reservation.

The Colorado River Indian Tribes move pursuant to Article IX of that Decree for the entry of a Supplemental Decree or amendment to the original Decree adjudicating additional present perfected rights to the Colorado River Indian Tribes in the waters of the Colorado River in annual quantities not to exceed (i) 219,811 acre-feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 37,449 net acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.

WHEREFORE, individually and collectively, the Colorado River Indian Tribes and the Cocopah Indian Tribe respectfully pray that this Court:

1. Pursuant to Article II(D)(5) and Article IX of the original Decree entered March 9, 1964, determine and decree to the Tribes additional present perfected rights in

the waters of the Colorado River, as set forth in I and II above.

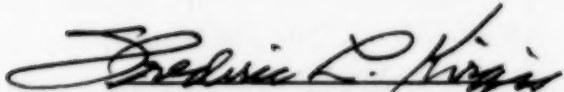
2. If the Court deems it desirable, appoint a Special Master to assist the Court in its determination of said additional present perfect rights.

Respectfully submitted,



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